

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA *ex rel.*
DR. KENT TAKEMOTO,

Plaintiff,

v.

DECISION AND ORDER
11-CV-613S

THE HARTFORD FINANCIAL SERVICES
GROUP, INC., ET AL.,

Defendants.

Relator Dr. Kent Takemoto alleges under the False Claims Act, 31 U.S.C. §§ 3729 et seq., that the various named defendants knowingly and improperly avoided their obligation to reimburse the United States for payments made to Medicare beneficiaries, as required by the Medicare Secondary Payer Act, 42 U.S.C. §§ 1395y et seq.

Presently before this Court is the Report and Recommendation of the Honorable Jeremiah J. McCarthy, United States Magistrate Judge, filed June 24, 2015 (Docket No. 314), recommending that Takemoto's amended complaint be dismissed with prejudice as to him and that his request to file an additional amended complaint be denied.

Both sides object to the Report and Recommendation. Takemoto objects to Judge McCarthy's finding that he failed to allege plausible causes of actions and to his recommendations that his amended complaint be dismissed and he not be permitted to replead his allegations. (Docket No. 320.) Defendants advocate for Judge McCarthy's ultimate recommendations, but object on a limited basis to his evaluating Takemoto's amended complaint under the general pleading standards in Rule 8 of the Federal Rules

of Civil Procedure, rather than the heightened pleading standards in Rule 9(b). (Docket No. 318).

Having reviewed the Report and Recommendation *de novo* after considering the objections and the parties' submissions, see 28 U.S.C. § 636(b)(1), this Court concurs with the recommendations contained in the Report and Recommendation. Takemoto's objections are therefore denied and his amended complaint will be dismissed with prejudice as to him, for the reasons set forth in the Report and Recommendation.

Defendants' objections are likewise denied. Because the allegations in Takemoto's amended complaint are insufficient under the general pleading standard in Rule 8, it is not necessary to decide whether they should have been assessed under the heightened pleading standard in Rule 9(b). Although False Claims Act claims are generally subject to Rule 9(b)'s heightened pleading standard, see Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476-77 (2d Cir. 1995) (referring to the False Claims Act as "an anti-fraud statute" and holding that Rule 9(b) applies to claims brought thereunder), there is arguably an open question as to whether claims under 31 U.S.C. § 3729(a)(1)(G) premised solely on allegations that a defendant "knowingly and improperly avoid[ed] . . . an obligation to pay or transmit money or property to the Government" sufficiently implicate fraud or mistake such that Rule 9(b) applies. Here, of course, Judge McCarthy stated his view that Rule 9(b) does not apply. This Court need not accept or reject this portion of the Report and Recommendation, since Takemoto's amended complaint fails both standards for the reasons stated in the Report and Recommendation. This Court therefore offers no opinion at this time and instead denies Defendants' objections as moot.

IT HEREBY IS ORDERED, that the Report and Recommendation (Docket No. 314) is ACCEPTED.

FURTHER, that the Objections (Docket Nos. 318, 320) are DENIED.

FURTHER, that the Motion to Dismiss (Docket No. 260) is GRANTED.

FURTHER, that the other pending Motions to Dismiss (Docket Nos. 261, 262, 263, 264, 265, 268, 272, 286) are DENIED AS MOOT.

FURTHER, that the Relator's Amended Complaint is DISMISSED WITH PREJUDICE as to Relator Takemoto, but without prejudice to the United States.

FURTHER, that the Clerk of the Court is directed to take the necessary steps to close this case.

SO ORDERED.

Date: January 20, 2016
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge